Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

THOMAS J. ALEXIOU,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the "last link" exception, first enunciated in *Baird v. Koermer*, 279 F.2d 591 (9th Cir. 1960), and erroneously applied to the case at bar, should be abolished.

II. Whether a lawyer should be compelled by grand jury subpoena to violate client confidences and secrets absent Court establishment of procedural safeguards to avoid "fishing expeditions" into generally sacrosanct waters and harassment by the United States Attorney.

III. Whether Court establishment of procedural safeguards is necessary to strike the proper balance between an attorney's ethical duties to a client and to the Court; obliterating tensions created by service of a grand jury subpoena upon an attorney fishing for confidences and secrets possessed by virtue of an attorney-client relationship.

PARTIES TO THE PROCEEDING

There are no other named parties other than those already identified in the caption of this case.

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PETITION FOR A WRIT OF CERTIORARI

Thomas J. Alexiou, Petitioner, respectfully prays a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered November 2, 1994. *See In re Subpoena to Testify Before the Grand Jury (Alexiou)*, 39 F.3d 973 (9th Cir. 1994), *reh'g denied*, No. 94-35401 (Dec. 29, 1994) (mem.) [attached as Appendix A]. On December 29, 1994, the Ninth Circuit denied Petitioner's motion for rehearing and suggestion for rehearing en banc [attached as Appendix B]. This matter is stayed pending review by this court [attached as Appendix C].

REFERENCE TO THE OPINIONS IN THE CASE

The judgment and opinion of the court is *In re Subpoena to Testify Before the Grand Jury (Alexiou)*, 39 F.3d 973 (9th Cir. 1994) [attached as Appendix A]. The district court has consistently stayed these proceedings pending review, the last stay being granted on March 17, 1995, to allow Petitioner to perfect this review [attached as Appendix C.]

GROUNDS FOR JURISDICTION

This Court has jurisdiction to issue a writ of certiorari. 28 U.S.C. § 1254 (1988).

The Ninth Circuit Court of Appeals had jurisdiction to review the district court proceeding. *United States v. Ryan*, 402 U.S. 530, 532 (1971); *Perlman v. United States*, 247

U.S. 7, 13 (1918); *In re Grand Jury Subpoena (Marger)*, 695 F.2d 363, 365 (9th Cir. 1982); *In re Grand Jury Proceedings (Schofield)*, 721 F.2d 1221, 1222 (9th Cir. 1983). The district court had jurisdiction under 28 U.S.C. § 1826(a) and 18 U.S.C. § 3231 (1988). Petitioner has timely filed his petition for a writ of certiorari. Supreme Court Rule 13.1.

STATEMENT OF THE CASE

Petitioner seeks review of the Ninth Circuit Court of Appeals' affirmance of an order denying his motion to quash a grand jury subpoena. The subpoena seeks *privileged* confidences and *secrets* received by an attorney from the attorney's *unidentified* client.

Petitioner, Thomas J. Alexiou, is an attorney in the State of Washington. He is an associate at Maxey Law Offices, P.S. His practice primarily focuses on defense work and domestic relations.

On April 19, 1994, Mr. Alexiou accepted facsimile service of a grand jury subpoena. He immediately moved for an order to quash the subpoena.

Although the district court denied the motion, it believed this to be a serious matter, and that Mr. Alexiou was acting in good faith, thus staying implementation of its order pending Mr. Alexiou's immediate and expedited appeal, envisioning appeal to this Court.

Two days later, Mr. Alexiou filed his Notice of Appeal. Then on November 2, 1994, the Ninth Circuit, in a published opinion, erroneously denied Mr. Alexiou's appeal. Mr. Alexiou immediately filed a petition for

rehearing and suggestion for rehearing en banc, also denied by the Ninth Circuit by order entered on December 29, 1994. [App. B].

The subpoena compelled Mr. Alexiou to disclose the "name, address, date, and amount of money received from the person who retained [his] services by giving [him] a $100 counterfeit federal reserve note." By uncontroverted affidavit Mr. Alexiou established the eight essential elements of the attorney client privilege, premised on the assumption that the unnamed targeted individual was indeed a client of Mr. Alexiou; a fact never established by the United States. Also established by uncontroverted affidavit was the unnamed targeted individual was represented by Mr. Alexiou in other pending criminal proceedings in state court (a fact known by the United States prior to issuance of the grand jury subpoena); and that Mr. Alexiou had no personal knowledge of any individual providing a counterfeit federal reserve note.

By the same uncontroverted affidavit, Mr. Alexiou also established the allegedly targeted individual's disclosure of name and address was provided in confidence and intended to be permanently protected from unconsented disclosure. There is no consent. [Attached App. F].

In response, the United States filed no affidavit nor was sworn testimony placed on the record. In short, no evidence was presented to the district court indicating a legitimate purpose in issuing the subpoena nor illustrating the government's reasonable belief Mr. Alexiou even represented the unnamed targeted individual. In fact, there was no showing the allegedly counterfeit note was

indeed counterfeit, or that other less intrusive avenues were inadequate to obtain the desired information.

Mr. Alexiou also demonstrated disclosure of the unnamed targeted individual would necessarily be the last link in the government's chain of evidence necessary to convict his "client". *Baird*, 279 F.2d at 630; *In re Grand Jury Subpoena (Horn)*, 976 F.2d 1314, 1317 (9th Cir. 1992).

Notably, to Mr. Alexiou's claim the subpoena, as written, was unreasonable, oppressive, ill-founded, and a fishing expedition, the Ninth Circuit remarked:

> If the Assistant United States Attorney's questions exceed the scope of the subpoena and delve into privileged communications, Alexiou is not precluded by this decision from testing again whether he must comply.

Yet, in his petition for rehearing and suggestion for rehearing en banc, Mr. Alexiou presented case law drawing distinction between "incriminating" and "convicting" when applying the "last link" exception announced in *Baird*, 279 F.2d 591, contending "incriminating is a much lower threshold than 'convicting'." *See Horn*, 976 F.2d at 1317; *In re Grand Jury Subpoena (Gerson)*, 976 F.2d 1314, 1317 (9th Cir. 1992) (citing *In re Grand Jury Proceedings (Pavlick)*, 680 F.2d 1026, 1027 (5th Cir. 1982) (en banc)). Nonetheless, the Ninth Circuit affirmed the district court, erroneously applying a "convicting" standard contrary to established circuit law, unaddressed by the Ninth Circuit.

REASONS TO GRANT THE WRIT

Compelling an attorney to disclose secret and privileged information to a federal grand jury, when state Rules of Professional Conduct prohibit disclosure of such "confidences or secrets relating to representation of a client" raises a serious constitutional and ethical dilemma for all attorneys, impacting bedrock constitutional principles.

Compelling an attorney to witness against his client, turns the adversary system on its head. Creating a conflict which should not exist it deprives citizens of counsel of choice. Seeking a convenient short cut, the prosecution undermines the citizen's confidence in his counsel, and systematic fairness, contrary to long established public policy.

The very delicate balance of the adversary process cannot tolerate such intolerance. Rather, this Court should grant review and, once and for all, resolve the ongoing conflict between state and federal law, giving clear, unquestionable guidance to all interested parties and the nation *definitively defining* the parameters of the attorney-client privilege in federal grand jury proceedings and overruling *Baird v. Koermer*, 279 F.2d 591 (9th Cir. 1960).

ARGUMENT

I. STATE RULES PROHIBIT ATTORNEYS FROM DISCLOSING CONFIDENTIAL AND SECRET INFORMATION OF A CLIENT WITHOUT THE CLIENT'S PERMISSION.

The essential importance of attorney-client confidentiality has been recognized for centuries. It is described as the oldest of privileges recognized by law. State bar codes and rules of professional conduct protect confidentiality beyond matters encompassed within the evidentiary attorney-client privilege.

Admission of lawyers and regulation of the practice of law has primarily been the providence of *the states.*

> History and policy combine to establish the presence of a substantial state interest in . . . the exertion of disciplinary powers which English and American courts . . . have for centuries possessed over members of the bar, incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied.

Cohen v. Hurley, 366 U.S. 117, 123-24 (1961).

This regulatory right is part of *the states'* broad powers to protect public health and safety; a power that is

> especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been "officers of the courts".

Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975).

> We recognize that *the states* have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions.

Id. (Emphasis added.)

Indeed, this Court has often held *the state* function of regulating attorneys may only be interfered with when *a state* acts unconstitutionally.

> [Under] our federal system *it is for the states to decide* which lawyers shall be admitted to the Bar and remain there; *this Court may interfere only if the state's decision* is rendered impermissible by the United States Constitution.

In re Primus, 436 U.S. 412, 440 (1978) (Rehnquist, J., dissenting) (emphasis added).

In fact, as this Court very recently reiterated, "[t]here is no federal general common law." *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. ___, 114 S. Ct. 2048, 129 L. Ed. 2d 67 (1994). *See* Fed. R. Evid. 501. And the State of Washington, through its Supreme Court, has expressly and specifically dealt with the disclosure of client confidences and secrets. *Seventh Elect Church v. Rogers*, 102 Wash. 2d 527, 688 P.2d 506 (1984).

In particular, Rule of Professional Conduct 1.6(a) of the Washington State Bar provides: "[a] lawyer *shall not reveal confidences or secrets relating to representation of a client . . . .*" *See* RPC 1.6(a) [at Appendix D]. *See also* Wash. Stat. Ann. § 5.60.060(2) (West 1995) [at Appendix E]. The state having chosen to so regulate attorney conduct,

absent some Constitutional constraint, state rules should control.

A. The United States Conceded State and Ethical Codes may Constitutionally Govern Attorney Conduct.

In a brief filed with this Court, the United States argued:

> Because of the special status of lawyers in the judicial system, we [Department of Justice] believe that state and ethical codes may constitutionally regulate attorneys.

Brief for the United States as Amicus Curiae (November 1990) at 4, *filed in Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). Not surprisingly, this position echoes the state courts' traditional role as the ultimate regulator of the practice of law. *Gentile*, 501 U.S. at 1066 (opinion of the Court, Rehnquist, C.J., as to Part I of the Court's opinion).

B. Even Federal Court Regulation of Attorney Conduct is based on State Codes of Professional Responsibility in Their Local Rules.

At the Federal level, promulgating and enforcing standards of conduct for attorneys is well-established. As the Ninth Circuit stated in *Paul E. Iacono Structural Engineer Inc. v. Humphrey*, 722 F.2d 435, 438 (9th Cir. 1983), "the district court has primary responsibility for controlling the conduct of attorneys practicing before it." In *United States v. Klubock*, 832 F.2d 664, 667 (1st Cir. 1987),

the First Circuit affirmed the district court's authority "to control ethical and procedural matters in their forum." *See also Addamax Corp. v. Open Software Foundation, Inc.*, 151 F.R.D. 504 (D. Mass. 1993).

In short, federal courts traditionally address ethical standards through the adoption of state rules. In fact, without exception, the Local Rules for the United States District Court for the Eastern District of Washington adopted the Rules of Professional Conduct promulgated by the State of Washington. *See* Local Rules of the United States District Court for the Eastern District of Washington, LR 1.2(f)(2). As such, these rules become Federal law. *United States v. Hvass*, 355 U.S. 570 (1958); *Wirtz v. Hooper-Holmes Bureau, Inc.*, 327 F.2d 939, 943 (5th Cir. 1964); *United States v. Hammad*, 858 F.2d 834 (2nd Cir. 1988); *United States v. Lopez*, 4 F.3d 1455 (9th Cir. 1993).

The canons of ethics have been held to be broader than the traditional evidentiary attorney-client privilege. *Brennan's Inc. v. Brennan's Restaurants, Inc.*, 590 F.2d 168 (5th Cir. 1979). And this Court has recognized the central importance of ethical standards in our legal system. *Wheat v. United States*, 486 U.S. 153 (1988).

For example, in *Wheat*, a defendant argued the Sixth Amendment right to counsel was violated when the district court refused to allow waiver of the right to conflict free representation in order to obtain representation from an attorney who had represented alleged co-conspirators. This Court rejected the contention stating:

> Federal courts have an independent interest in assuring that criminal trials are conducted

> within the ethical standards of the profession . . . . Both the American Bar Association's Code of Professional Responsibility and its Model Rules of Professional Conduct, as well as the rules of the California Bar Association . . . impose limitations on multiple representation of clients . . .

Id. at 160. Not surprisingly, in *Wheat*, enforcement of an attorney's ethical obligations overrode a defendant's constitutionally grounded right to counsel of his choice. Attorney Alexiou is acting in the best tradition of his profession abiding by *state* constraints.

C. Washington's Interpretation of Rule of Professional Conduct 1.6 Prohibits Disclosure of the Amount, Source, and Manner of Payment as Being a "Secret" for Purposes of the Rule.

In *Seventh Elect Church v. Rogers*, 102 Wash. 2d 527, 688 P.2d 506 (1984), the Washington State Supreme Court interpreted an earlier (but very similar) version of the professional code, Disciplinary Rule 4-101(B)(1), as including the "amount, source and manner of payment of legal fees" as a "secret." *Seventh Elect Church*, 102 Wash. 2d at 534.

Another Washington case, *State v. Sheppard*, 52 Wash. App. 707, 763 P.2d 1232 (1988), addressed *Seventh Elect Church* and *Baird v. Koermer*, 279 F.2d 591 (9th Cir. 1960), concluding disclosure of fee information together with the identity of a client is privileged if the existence of the fee arrangement conveys the substance of a confidential communication between attorney and client. *Sheppard*, 52 Wash. App. at 712. Unlike the attorney in *Sheppard*, Mr.

Alexiou showed his client did not authorize disclosure of the retainer information. Thus, the information called for by subpoena falls under the "secret" category of RPC 1.6(a) and is privileged. *Cf. Id.* at 714. In fact, the state court of appeals in *Sheppard* made it plain disclosure of client information in circumstances like Mr. Alexiou's would qualify as a "secret." To quote:

> The only situation that we can envision that would make the information likely to be detrimental to the clients would be if the information would subject them to criminal liability. *See Seventh Elect Church*, 102 [Wash.] 2d at 536. However, in most situations in which disclosure of fee information would subject the client to criminal liability, the information is already protected by the attorney-client privilege because such information is protected when it would in effect reveal a confidential professional communication.

Id.

Since Washington law clearly governs Mr. Alexiou's conduct, he must follow its commands. LR 1.2(f)(2). And the clearest command of all is that Attorney Alexiou *must* claim privilege.

> If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (a) requires the lawyer to invoke the privilege when it is applicable.

Annotated Model Rules of Professional Conduct, Rule 1.6 at 88 (2d Ed. 1992) (comment).[1] Attorney Alexiou is honor-

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[1] It should be noted that RPC 1.6 closely models the ABA's Model Rule 1.6, except that "confidences or secrets" is substituted for "information". Therefore, RPC 1.6 supports a broader

bound to assert the privilege. This dilemma recognized by the trial court, places Mr. Alexiou squarely between a Charybdis and a Scylla – to do or not do polar opposites. Given this dilemma, review is justified. Sup. Ct. R. 10.1.

II. THE "LAST LINK" EXCEPTION'S FAILINGS, TRANSMUTATION, DIFFICULTY IN APPLICATION, UNPREDICTABILITY, AND CONFLICT BETWEEN FEDERAL AND STATE LAW, REQUIRE THIS COURT TO OVERRULE BAIRD V. KOERMER, 279 F.2D 591 (9TH CIR. 1960) AND FASHION PROCEDURAL SAFEGUARDS STRIKING A PROPER CONSTITUTIONAL BALANCE BETWEEN AN ATTORNEY AND A CLIENTS' RESPECTIVE RIGHTS AND DUTIES IN THE FACE OF A GRAND JURY SUBPOENA.

It is axiomatic, standards are necessary to put at least some minimal control on a prosecutor's discretion to subpoena attorneys representing grand jury targets. *See generally United States v. Williams*, 112 S. Ct. 1735 (1992) (federal courts have power to fashion rules); *United States v. Perry*, 857 F.2d 1346 (9th Cir. 1988) (showing required by government that information sought is relevant, needed, and cannot otherwise be obtained).

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attorney-client privilege than does the Model Rule. This critical difference in language also distinguishes Attorney Alexiou's case from *In re Grand Jury Proceedings (Chesnoff)*, 13 F.3d 1293 (9th Cir. 1994), where the Model Rule was construed *not* to forbid a lawyer from disclosing client fee information pursuant to a grand jury subpoena. *Chesnoff*, 13 F.3d at 1297.

Otherwise, citizens will be extremely reluctant to provide their real names, addresses, and general or specific information to counsel. Rogue subpoenas will devastate the attorney-client relationship. A client will regard counsel as a potential adverse witness to his interests. Procedural guidelines are essential if prosecutorial abuse of grand jury subpoenas is to be avoided.

Obviously the United States Attorney chose an untenable position. Simultaneously he felt the "evidence" "sufficiently important" to his underlying prosecution to justify compelling Mr. Alexiou's testimony, yet *not* so important nor critical to constitute the "last link" in a chain of incriminating evidence against an alleged client.

The Ninth Circuit correctly held fee information is not ordinarily privileged, even though incidentally "it *may* evidence wrongdoing by the client." *In re Grand Jury Proceedings (Goodman)*, 33 F.3d 1060, 1063 (9th Cir 1994) (mem.), *quoting In re Osterhoudt*, 722 F.2d 591, 592 (9th Cir. 1983). However, *in this situation* the "incriminating nature" of this *unnamed* client's information is not "merely incidental" to the compelled production by the lawyer.

Rather, the fee arrangement between Mr. Alexiou and his client is information which the client reasonably expected to be kept confidential and not incidental to the reason for obtaining legal advice. Certainly, the client's initial act of producing a fee in the first place was either a privileged communication or a secret. It says the following: "I have this amount of money in this form to pay you for your services." "I am paying you in cash to guard

against disclosing to others that I have retained an attorney." A communication made that would not have been made absent the attorney-client relationship. A communication made for the purpose of obtaining legal advice. A communication which is the last link in a chain of incriminating evidence leading to the client's indictment. *For example In re Grand Jury Proceedings (GJ90-2)*, 946 F.2d 746 (11th Cir. 1991). Unquestionably Washington's position, under *Seventh Elect Church, supra,* and *Sheppard, supra,* governs Attorney Alexiou's conduct under the Rules of Professional Conduct of the Washington State Bar as adopted by the federal courts, LR 1.2(f)(2), and shared by the District of Massachusetts. *United States v. Gertner,* ___ F. Supp. ___, 1995 WL 40768 at 5 (DCT D. Mass. Jan. 11, 1995) (citing *In re Grand Jury Subpoenas (Anderson),* 906 F.2d 1485, 1488 (10th Cir. 1990) (held that the source of legal fees are privileged in certain special circumstances).

In *Gertner,* an attorney represented an unidentified client. *Gertner,* 1995 WL 40768 at 1. As here, the client paid in cash. *Id.* Subsequently, as here, the United States Attorney issued compulsory process to force production of the "complete name, address, business or occupation, social security or taxpayer identification number, passport number, alien registration number and any other identifying data for the client involved." *Id.* at 2.

Just like Attorney Alexiou, Attorney Gertner sought the advice of her bar association. *Id.* As here, the bar advised to resist the compulsory process. *See Id.* Unlike here, however, the First Circuit held, on balance, public policy prohibited disclosure. The Ninth Circuit is in conflict, requiring review by this Court to resolve the circuit split. Sup. Ct. R. 10.1.

Failure to recognize the privilege in these circumstances would ignore reality. In order to seek advice one must of necessity seek out counsel. If the act of contacting or retaining counsel is deemed incriminatory, but not protected, rational citizens won't seek out competent, ethical legal advice and representation in the first place. In order to afford the citizenry a meaningful right to seek privileged advice, the law must accord protection to the act of seeking out and retaining counsel.

There is nothing sinister about seeking out or compensating counsel for legal advice. Unless our citizenry is protected from indiscriminate prosecutorial use of Rogue grand jury subpoenas, the privileged nature of "advice of counsel" will constitute a hollow fiction. *Baird* promotes this fiction and needlessly confuses the matter. Indeed, *Baird* has been so eroded, misunderstood, misapplied, and confused by subsequent decisions, it should be discarded by this Court. *Compare Tornay v. United States*, 840 F.2d 1424 (9th Cir. 1988); *Osterhoudt*, 722 F.2d 591; and *In re Grand Jury Subpoenas (Hirsch)*, 803 F.2d 493, 496-98 (9th Cir. 1986). In fact, the courts of appeal have so narrowed and distinguished *Baird* that fee information is considered privileged only if disclosure would *itself* reveal a confidential communication; thus avoiding the "last link" issue through sophistry in direct conflict with state ethical rules as adopted by the federal court! *Cf. In re Grand Jury Proceedings (GJ90-2)*, 946 F.2d at 748; *In re Grand Jury Matter*, 926 F.2d 348, 351-52 (4th Cir. 1991); *In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena*, 926 F.2d 1423, 1431 (5th Cir. 1991); *In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena*, 913 F.2d 1118, 1125 n.11 (5th Cir.

1990), *cert. denied*, 499 U.S. 959 (1991); *Anderson*, 906 F.2d at 1491-92; *In re Grand Jury Proceedings 88-9 (MIA)*, 899 F.2d 1039, 1043 (11th Cir. 1990); *Tornay*, 840 F.2d at 1428; *In re Shargel*, 742 F.2d 61, 62 n.2 & 63-64 (2nd Cir. 1984); *United States v. Liebman*, 742 F.2d 807, 810 (3rd Cir. 1984); *In re Witness Before the Special March 1980 Grand Jury*, 729 F.2d 489, 493-95 (7th Cir. 1984); *In re Grand Jury Investigation No. 83-2-35*, 723 F.2d 447, 453 (6th Cir. 1983), *cert. denied*, 467 U.S. 1246 (1984); *Osterhoudt*, 722 F.2d at 593.

The only rational response is for this Court to exercise its inherent powers over the process, *United States v. Williams*, ___ U.S. ___, 112 S. Ct. 1735, ___ L.Ed.2d ___ (1992), and fashion a new rule. As opined by Justice Stevens with whom Justices Blackmun, O'Conner, and Thomas joined (dissenting), "Like the hydra slain by Hercules prosecutorial misconduct has many heads." *Williams*, 112 S. Ct. at 1749. "Although the grand jury has not been 'textually assigned' to 'any of the branches described in the first three articles' of the constitution . . . it is not an autonomous body completely beyond the reach of the other branches" *id.* at 1752, and is "a part of the Court." *Id.* More particularly as noted therein:

> [T]he Court has recognized that it has the authority to create and enforce limited rules applicable to grand jury proceedings. Thus, for example, the Court has said that the grand jury "may not itself violate a valid privilege, whether established by the Constitution, statutes, or the common law." *United States v. Calandra*, 414 U.S. 338, 94 S. Ct. 613, 38 L.Ed.2d 561 (1974). And the Court may prevent a grand jury from violating such a privilege by quashing or modifying a subpoena, *id.*, at 346, n. 4, 94 S. Ct. at 619, n. 4,

> or issuing a protective order forbidding questions in violation of the privilege, *Gravel v. United States*, 408 U.S. 606, 628-629, 92 S. Ct. 2614, 2628-2629, 33 L.Ed.2d 583 (1972). Moreover, there are, as the Court notes, *ante*, at 1742-1743, a series of cases in which we declined to impose categorical restraints on the grand jury. In note of those cases, however, did we question our power to reach a contrary result.

At a minimum, the United States should be required to establish, prima facie, that the information it seeks is relevant, needed, and *cannot otherwise be obtained*. *Perry*, 857 F.2d 1346. The establishment of a procedure would strike the proper balance between privilege and public policy and once and for all definitely end the debate while giving clear guidance to all.

Compelling attorneys to disclose fee information jeopardizes us all and our ability to retain counsel, chilling consequences on the very act of obtaining legal advice. *Reyes-Requena*, 926 F.2d at 1432. Attorney Alexiou, and all counsel in similar situations, are left with acutely conflicting state and federal law forcing counsel to make disclosures subjecting themselves to discipline under state law for those very disclosures. This cannot be the balance envisioned in *Baird* or by this Court in *Williams*. *Baird* recognized that it is *the state* that brings attorneys into being.

The adversary process has been delicately balanced so that advocates can operate without mutual interference, representing their competing interests in the best manner possible. Allowing an opponent to employ a

grand jury to conduct "fishing expeditions" into confidential and secret areas strikes at the very heart of this balance. Proper deference is not being given Washington's Rules of Professional Conduct. *Baird* should be overruled and replaced with definitive guidelines enunciated by this Court.

CONCLUSION

The writ for certiorari should issue. *Baird v. Koermer*, 279 F.2d 591 (9th Cir. 1960) and its progeny should be overruled and replaced with definitive uniform clear guidelines enunciated by this Court.

DATED: March 24, 1995

Respectfully submitted,

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DENNIS C. CRONIN
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Attorney at Law

On Brief:

DENNIS C. CRONIN
JOHN M. COOPER
Attorney at Law

APPENDIX A

In re SUBPOENA TO TESTIFY BEFORE the GRAND JURY,

Thomas J. ALEXIOU, Witness-Appellant,

v.

UNITED STATES of America, Appellee.

No. 94-35401.
GJ-94-0163-WFN.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Aug. 3, 1994.

Decided Nov. 2, 1994.

[p. 974 starts]

Appeal from the United States District Court for the Eastern District of Washington.

Dennis C. Cronin (argued), and Carl Maxey (on the briefs), Maxey Law Offices, Spokane, WA, for appellant.

Thomas O. Rice, Asst. U.S. Atty., Spokane, WA, for appellee.

Aaron L. Lowe, Aaron L. Lowe & Associates, Spokane, WA, for amicus.

Before ALARCON, BEEZER and KLEINFELD, Circuit Judges.

KLEINFELD, Circuit Judge:

An attorney was subpoenaed to produce material before a grand jury which he obtained from a client. The district court ruled that the attorney-client privilege

would not be violated, and denied a motion to quash. We affirm.

I. FACTS

Mr. Alexiou, an attorney, deposited money in his law firm bank account. The deposit included a $100 bill which turned out to be counterfeit. The Secret Service eventually contacted him, asking for the identity of the person who passed the bill. Mr. Alexiou consulted the Washington Rules of Professional Conduct for attorneys and decided that he could not ethically respond to the inquiry. His concern, based on his own examination and consultation with staff counsel for the Washington State Bar Association, was that the identity of a client was secret and could not be disclosed without a court order. In a letter to the Assistant United States Attorney on the case, Mr. Alexiou explained that:

> Lastly, the client simply retained us to represent him, paying a modest retainer for modest events. All violations were traffic with the exception of a misdemeanor assault charge. The client made no disclosure as to the source of the money to us. From what the bank has advised, there was one questionable bill amongst the amount paid which now is decidedly counterfeit and that is all I can tell you. Under the advice of the Washington State Bar Association Ethical Legal Department and pursuant to the Rules of Professional Conduct we are bound to make no disclosure at this time.

Despite Mr. Alexiou's independent research suggesting that the information requested would be confidential,

the Assistant United States Attorney obtained a subpoena duces tecum, commanding Mr. Alexiou to appear before the grand jury to testify, and to bring with him the "name, address, date, and amount of money received from the person who retained your services by giving you a counterfeit $100 federal reserve note." Mr.

[p. 975 starts]

Alexiou moved to quash on grounds of attorney-client privilege. In his affidavit, Mr. Alexiou said:

> I have no personal knowledge of any individual providing an allegedly counterfeit 100 dollar federal reserve note to Maxey Law Offices. I rarely accept cash from clients for retainer fees. This is handled by others in the office.
>
> My lack of first-hand knowledge notwithstanding, this individual deposited monies with Maxey Law Offices for representation for legal advice from a professional attorney. In this capacity, the individual provided information otherwise unnecessary including but not limited to his name and address in order to communicate. These disclosures were made in confidence by this individual and intended to be permanently protected from disclosure by the attorney without the client's consent. The individual did not waive that privilege.
>
> I hold my obligation to a client above any obligation to a grand jury. The sanctity of confidential communications between client and attorney is the sine qua non of the legal profession. I do not wish to be sanctioned by my licensing agency, the Washington State Bar

> Association, and I fear that I will be sanctioned if forced to comply with this subpoena.

At the hearing on the motion to quash, the Assistant United States Attorney disputed Mr. Alexiou's suggestion that his client's identity was privileged. He told the district judge that it was important to contact Mr. Alexiou's client, because he could help provide information about similar counterfeit bills that had been passed in the Spokane area. He denied that Mr. Alexiou's identification of his client would be the "last link" in the chain of evidence necessary to indict the client, because the government's counterfeiting case would still require proof that the bill was passed with the knowledge that it was fake and with the intent to defraud. He explained that many people, including bankers, had passed these bills innocently.

The district court denied the motion to quash. It held that:

> 1. The subpoenaed attorney's Motion to Quash the Subpoena to Testify before the Grand Jury is DENIED. The information sought by the subpoena does not represent a confidential professional communication. *In re Grand Jury Subpoenas v. Hirsch*, 803 F.2d 493, 497 (9th Cir.1986).

Mr. Alexiou brought an expedited appeal to this court. We affirm.

II. ANALYSIS

A. Jurisdiction

As a threshold matter, we must determine whether or not we have jurisdiction over this appeal. Generally "one

to whom a subpoena is directed may not appeal the denial of a motion to quash that subpoena but must either obey its commands or refuse to do so and contest the validity of the subpoena if he is subsequently cited for contempt on account of his failure to obey." *United States v. Ryan*, 402 U.S. 530, 532, 91 S.Ct. 1580, 1581, 29 L.Ed.2d 85 (1971); *In re Grand Jury Subpoena (Horn)*, 976 F.2d 1314, 1316 (9th Cir.1992). There is, however, an exception to this rule, based on *Perlman v. United States*, 247 U.S. 7, 13, 38 S.Ct. 417, 419, 62 L.Ed. 950 (1918), *recognized in Ryan*, 402 U.S. at 533, 91 S.Ct. at 1582. "[A]n immediate appeal is proper when the subpoena is directed to a third party, here the appellant's attorney, because that party normally will not be expected to risk a contempt citation but will instead surrender the sought-after information, thereby precluding effective appellate review at a later stage." *In re Grand Jury Subpoenas (Marger)*, 695 F.2d 363, 365 (9th Cir.1982); *In re Grand Jury Proceeding (Schofield)*, 721 F.2d 1221, 1222 (9th Cir.1983). In this case, Mr. Alexiou cannot be expected to accept a contempt citation and go to jail in order to protect the identity of a client who paid his fee with counterfeit money. If his client's right, if any, to secrecy of the transaction is to be protected at all, we must review the district court decision now. Review at this time appears to be required by *Perlman* as construed by *Marger* and *Schofield*.

B. Personal Knowledge

Although his affidavit avers that he lacks the personal knowledge necessary to

[p. 976 starts]

testify about the requested records, Mr. Alexiou probably cannot avoid the disclosure on this basis. His affidavit suggests that someone else in his law office physically receives money from clients for the attorneys' professional services and prepares bank deposits, not Mr. Alexiou. But the subpoena commands Mr. Alexiou to bring the information with him. There is nothing in the record to suggest that Mr. Alexiou lacks the authority within his law office to tell his receptionist or office manager to give him the cash receipts and other records for that day, and ask that person how the office came into possession of the $100 bill. The hearsay rule does not apply to grand jury proceedings, Fed.R.Evid. 1101; *United States v. Trass*, 644 F.2d 791, 793 (9th Cir.1981). The prosecutor will in all likelihood be able to lay sufficient foundation for grand jury purposes for Mr. Alexiou to testify about his business records and how the $100 bill came into his office.

C. Attorney-Client Privilege

The subpoena duces tecum and the order of the district court require that Mr. Alexiou provide the name, address, date and amount of money received from the client who used the counterfeit $100 bill. He argues that this information is privileged. The district court's denial of Alexiou's motion to quash the subpoena is reviewed for abuse of discretion. *In re Grand Jury Proceedings (Hirsch)*, 803 F.2d 493, 496 (9th Cir.1986). Whether an attorney-client privilege exists is a mixed question of fact and law which is reviewed *de novo*. *Tornay v. United States*, 840 F.2d 1424, 1426 (9th Cir.1988).

Generally, the attorney client privilege does not protect against disclosure of the identity of the client and the fee arrangements between lawyer and client. *In re Grand Jury Proceedings (Goodman)*, 33 F.3d 1060, 1063 (9th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 187, 130 L.Ed.2d 120 (1994); *Tornay*, 840 F.2d at 1426. There is an exception where identification of the client conveys information which is itself privileged. *Baird v. Koerner*, 279 F.2d 623, 630 (9th Cir.1960). For example, if revealing the client's identity would constitute an acknowledgment of guilt of the offense which led the client to seek legal assistance, then the identity of the client would be privileged. *In re Grand Jury Subpoena (Horn)*, 976 F.2d 1314, 1317 (9th Cir.1992).

This exception to the no-privilege rule does not operate in every instance where disclosure of the client's identity would incriminate the client or lead to indictment. "In order to qualify for the protection afforded by the attorney-client privilege, information regarding client identity or legal fees must be 'in substance a disclosure of the confidential communication in the professional relationship between the client and the attorney.' " *In re Grand Jury Subpoena (Horn)*, 976 F.2d at 1317 (quoting *In re Grand Jury Subpoena (Osterhoudt)*, 722 F.2d 591, 593 (9th Cir.1983)). The exception might operate to prevent the disclosure here if the disclosure were the last link in the chain of testimony necessary to convict the client. *Baird*, 279 F.2d 623, 633. But as the government explained in its argument, the client's identity would not suffice in this case; knowledge and intent would still have to be proved. No doubt many innocent people pass counterfeit bills without realizing it. In all likelihood, Mr. Alexiou was the

victim of a counterfeiter, and lost $100 which he was entitled to for his services because of the crime. His client who paid it to him may be in the same position.

In this case, the communication of the client's name and payment were entirely distinct from the matter in which the client sought the lawyer's services. It was therefore unprotected by the privilege. *In re Grand Jury Subpoena (Osterhoudt)*, 722 F.2d 591, 595 (9th Cir.1983). Evidently the client retained Mr. Alexiou to represent him in traffic matters and an assault, not anything having to do with counterfeiting. If the client knew the bill was counterfeit, then Mr. Alexiou was the victim of a crime by his client entirely distinct from the matter in which Mr. Alexiou was retained. If the client did not know, then both of them were victims, and the disclosure would not implicate the client at all. Either way, the disclosure would not be the last link in a chain of evidence which would lead to conviction, and

[p. 977 starts]

it was not error for the district court to deny the motion to quash.

D. New Issues on Appeal

Although he did not raise these claims below, Mr. Alexiou now asserts that the subpoena should have been quashed because the Assistant United States Attorney did not show a legitimate need for the information and the information request was so oppressive and unreasonable that disclosure creates conflicts with the client's Sixth Amendment right to counsel. We "decline to review an

issue not properly raised below unless it is necessary to prevent a manifest injustice." *In re Marvin Properties*, 854 F.2d 1183, 1187 (9th Cir.1988). No manifest injustice will arise in this case from failing to consider these new arguments. The district judge is in the better position to consider, in the first instance, whether the requirements for a subpoena are met.

The relevant requirements are explained in *In re Grand Jury Proceeding (Schofield)*, 721 F.2d 1221, 1223 (9th Cir.1983). We have not found a place in the record where Mr. Alexiou argued that these requirements were not met. The Assistant United States Attorney told the district judge that he needed the identity of Mr. Alexiou's client because similar bills were being passed in the area. On the other hand, a client might feel a need to fire a lawyer who had testified against him before a grand jury, so such subpoenas could be a means by which prosecutors might cause distrust and changes of attorney among their adversaries. The district court, not we, takes the first look at such issues, when they are raised. There is no suggestion in the record that the Assistant United States Attorney concocted a reason to subpoena the lawyer in order to set up a conflict of interests between lawyer or client, or otherwise deprive the client of the lawyer of his choice.

This case has been argued on the basis of the common law privilege, not the Sixth Amendment right to counsel. We therefore do not have occasion to decide whether the right to counsel attached, in the absence of a charge relating to the counterfeiting. *Moran v. Burbine*, 475 U.S. 412, 427, 106 S.Ct. 1135, 1144, 89 L.Ed.2d 410 (1986).

The subpoena is limited to the "name, address, date, and amount of money received from" the client. This is not an open-ended command. As the district judge correctly noted, "[t]he substance of the actual consultations between [Alexiou] and the fee payer . . . will remain privileged despite disclosure of the requested information. . . . " If the Assistant United States Attorney's questions exceed the scope of the subpoena and delve into privileged communications, Alexiou is not precluded by this decision from testing again whether he must comply.

AFFIRMED.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re:	)	No. 94-35401
SUBPOENA TO TESTIFY THE GRAND JURY,	)	GJ-94-0163-WFN
	)	ORDER
THOMAS J. ALEXIOU, Witness-Appellant,	)	
v.	)	
UNITED STATES OF AMERICA, Appellee.	)	

Before: ALARCON, BEEZER and KLEINFELD, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges Beezer and Kleinfeld reject the suggestion for rehearing en banc; and Judge Alarcon would so recommend.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

FILED December 29, 1994.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

IN RE:	)	GRAND JURY PANEL
	)	94-2S
SUBPOENA TO TESTIFY BEFORE GRAND JURY,	)	ORDER
THOMAS J. ALEXIOU,	)	
Subpoenaed Attorney.	)	

Before the court is a Motion to Quash Subpoena to Testify Before the Grand Jury and for an Order Continuing Stay of Proceedings Pending Petition for Certiorari. The motion is presented by Carl Maxey and Dennis Cronin representing Thomas J. Alexiou. The government did not have an opportunity to respond to the motion.

BACKGROUND

On April 19, 1994, Thomas J. Alexiou received a subpoena to testify before Grand Jury Panel 94-2S. On April 20, 1994, Mr. Alexiou filed and argued a motion to quash the subpoena before this court. During oral argument Mr. Alexiou also requested the court stay any adverse decision and Assistant United States Attorney Tom Rice admitted that exigent circumstances did not exist requiring an immediate order that Mr. Alexiou comply with the subpoena.

On April 20, 1994, this court denied Mr. Alexiou's motion to Quash but granted his motion to stay proceedings pending appellate review. On November 2, 1994, the Court of Appeals filed its published opinion upholding the trial court and on December 29, 1994, the Circuit denied Mr. Alexiou's petition for rehearing and rejected Mr. Alexiou's suggestion for rehearing en banc.

On March 17, 1995, Mr. Alexiou filed the current motions. The motion does not state whether Mr. Alexiou is subpoenaed to appear before the Grand Jury on March 21, 1995. In an affidavit to Dennis C. Cronin, Mr. Alexiou submits that as of March 21, 1995, he will have pending before the United States Supreme Court a petition for certiorari. He argues that the case of United States v. Gertner, 94-11667 (D. Mass. 1/11/95) supports his previous arguments that he cannot be compelled to divulge the information requested by the contested subpoena because the information is privileged.

DISCUSSION

Rules 13.1 and 13.4 of the Supreme Court Rules provide that a party has 90 days after entry of judgment to file a petition for a writ of certiorari, however if a petition for rehearing is timely filed, then the time for filing a petition for writ of certiorari runs from the date of the denial of the petition for rehearing. In this case, the 90 days for filing the writ of certiorari would run from December 29, 1994, the date upon which the Circuit denied Mr. Alexiou's petition for rehearing. Mr. Alexiou may timely file a petition for writ of certiorari through March 29, 1995.

Mr. Alexiou cites United States v. Gertner, *supra*, in support of his argument that the identity of the person providing his law firm with the $100 counterfeit bill is privileged information. In Gertner, the district court held that disclosure required by 26 U.S.C. § 6050I under the special circumstances of the case required the court to treat the client information as privileged. The judge recited the general rule that the identity of an attorney's client and the source of payment for legal fees are not normally protected, but proceeded to identify three possible exceptions. The exception upon which the court rested its holding was that where there is a strong possibility that disclosure would implicate the client in the very criminal activity for which legal advice was sought, the client's identity or fee arrangement may be privileged.

The Gertner case is distinguishable. The Ninth Circuit in its memorandum opinion in this case stated that the communication of the client's name and payment were entirely distinct from the matter in which the clients sought the lawyer's services. It was therefore unprotected by the privilege. *In Re Subpoena to Testify Before Grand Jury (Alexiou)*, 39 F.3d 973, 976 (9th Cir. 1994). The client retained Mr. Alexiou to represent him in traffic matters, having nothing to do with counterfeiting.

The Ninth Circuit found it proper that an immediate appeal of the denial of the motion to quash the subpoena occur because Mr. Alexiou could not be expected to accept a contempt citation and go to jail just to protect the identity of the client. *Id.* at 975. Similarly, at this stage in the proceeding, he could not be expected to accept the contempt citation and it is appropriate that the court stay

the proceedings pending a decision by the Supreme Court on Mr. Alexiou's petition for certiorari. Accordingly,

IT IS ORDERED that:

1. Mr. Alexiou's Motion to Quash the Subpoena to Testify Before the Grand Jury is **DENIED**.

2. Mr. Alexiou's Motion for an Order Continuing the Stay of Proceedings Pending the Petition for Certiorari is **GRANTED**. If the government opposes the continuation of the stay, the court would entertain a motion to lift the stay.

The Clerk is directed to file this Order and provide copies to counsel.

DATED this 17 day of March, 1995.

/s/
WM. FREMMING NIELSEN
UNITED STATES
DISTRICT JUDGE

APPENDIX D

RULE 1.6

CONFIDENTIALITY

(a) A lawyer shall not reveal confidences or secrets relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in sections (b) and (c).

(b) A lawyer may reveal confidences or secrets to the extent the lawyer reasonably believes necessary:

(1) To prevent the client from committing a crime; or

(2) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, to respond to allegations in any proceeding concerning the lawyer's representation of the client, or pursuant to court order.

(c) A lawyer may reveal to the tribunal confidences or secrets which disclose any breach of fiduciary responsibility by a client who is a guardian, personal representative, receiver, or other court appointed fiduciary.

APPENDIX E

5.60.060. Who are disqualified – Privileged communications

* * *

(2) An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.

* * *

APPENDIX F

Carl Maxey
Dennis C. Cronin
MAXEY LAW OFFICES, P.S.
1835 W. Broadway
Spokane, Washington 99201
Phone: 509/326-0338

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

IN RE: SUBPOENA TO TESTIFY BEFORE GRAND JURY, THOMAS A. ALEXIOU, Subpoenaed Attorney.	GRAND JURY PANEL 94-2S AFFIDAVIT OF THOMAS J. ALEXIOU

STATE OF WASHINGTON)
: ss.
County of Spokane)

THOMAS J. ALEXIOU, being first duly sworn, on oath deposes and says: that I am the subpoenaed attorney in this case and I make this affidavit in support of the motion for order quashing the Subpoena to Testify Before Grand Jury.

I am an attorney licensed to practice law in the State of Washington and subject to the Rules of Professional Conduct (RPC).

In January of 1994, I was contacted by a representative of the United States Secret Service to inquire about a 100 dollar bill allegedly received by Seafirst Bank for deposit into the account of Maxey Law Offices, P.S. The Secret Service representative advised that it was determined the bill was counterfeit. He stated the Secret Service wanted to know the identity of the individual who provided the bill to the firm for which I am employed. Upon the Secret Service's inquiry, I immediately consulted the Rules of Professional Conduct and determined that RPC 1.6 would apply and preclude me from providing the subpoenaed information.

I then contacted the Legal Ethics Committee of the Washington State Bar Association in order to determine the nature and extent of my responsibilities to a client and under these circumstances. I spoke with Mr. Robert Weldon of the Legal Ethics Committee who stated that according to RPC 1.6(a), the identity of the client is regarded as a secret and could not be disclosed without court order. My conversation with Mr. Weldon was related to Assistant United States Attorney Thomas O. Rice in a letter dated January 25, 1994.

On or about April 19, 1994, I received via facsimile transmission, a Subpoena to Testify Before Grand Jury, Grand Jury Panel 94-2S, directing me to appear before the Grand Jury on April 19, 1994 at 9 a.m. (or as directed) and further directs me to produce the following materials:

> "Name, address, date, and amount of money received from the person who retained your services by giving you a $100 counterfeit federal reserve note."

I have no personal knowledge of any individual providing an allegedly counterfeit 100 dollar federal reserve note to Maxey Law Offices. I rarely accept any cash from clients for retainer fees. This is handled by others in the office.

My lack of first-hand knowledge notwithstanding, this individual deposited monies with Maxey Law Offices for representation for legal advice from a professional attorney. In this capacity, the individual provided information otherwise unnecessary including but not limited to his name and address, in order to communicate. These disclosures were made in confidence by this individual and intended to be permanently protected from disclosure by the attorney without the client's consent. The individual did not waive privilege.

I hold my obligation to a client above any obligation to a grand jury. The sanctity of confidential communications between client and attorney is the sine qua non of the legal profession. I do not wish to be sanctioned by my licensing agency, the Washington State Bar Association, and I fear that I will be sanctioned if forced to comply with the subpoena.

The information sought by the subpoena is protected by attorney-client privilege. I respectfully request the court to quash the subpoena and not force me to make a disclosure which I feel would dishonor my profession.

_____

THOMAS J. ALEXIOU

SUBSCRIBED AND SWORN to before me this ___ day of April, 1994.

NOTARY PUBLIC in and for the State of Washington, residing at Spokane. My commission expires: ___.